

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CONSUMER FINANCIAL
PROTECTION BUREAU,

Plaintiff

vs

NAVIENT CORPORATION,

Defendant

3:17-CV-00101

TRANSCRIPT OF PROCEEDINGS - TELEPHONE CONFERENCE
BEFORE THE HONORABLE ROBERT D. MARIANI
THURSDAY, JANUARY 18, 2018
SCRANTON, PENNSYLVANIA

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1 THE COURT: Counsel, good afternoon. It would be
2 helpful if each of you would identify yourselves for the
3 benefit of my stenographer beginning with Mr. Jabbour.

4 MR. JABBOUR: Hi. Good morning, Your Honor. This is
5 Nicholas Jabbour for the Bureau.

6 THE COURT: Thank you. Next.

7 MR. PAIKIN: Good morning, Your Honor. This is
8 Jonathan Paikin for defendants.

9 THE COURT: I know that there are a number of other
10 counsel participating in the call. Perhaps, again, they should
11 identify themselves in the event that they find it necessary to
12 address an issue during this discussion.

13 So along with Mr. Jabbour is Andrea Matthews, is that
14 right?

15 MS. MATTHEWS: Yes, Your Honor.

16 THE COURT: And Lawrence DeMille-Wagman?

17 MR. JABBOUR: Your Honor, he's not on the call.

18 THE COURT: I see. Thank you.

19 Ebony Johnson?

20 MS. JOHNSON: Yes, Your Honor.

21 THE COURT: Nicholas Lee is also on this call, am I
22 correct?

23 MR. LEE: Yes, Your Honor. Good afternoon.

24 THE COURT: Good afternoon.

25 And Manual Arreaza?

1 MR. ARREAZA: Yes, Your Honor.

2 THE COURT: That completes the counsel for the
3 plaintiff, is that right, Mr. Jabbour?

4 MR. JABBOUR: Yes, that's correct.

5 THE COURT: And for Navient, Daniel Kearney?

6 MR. KEARNEY: Good afternoon, Your Honor.

7 THE COURT: And, of course, Jonathan Paikin has
8 already noted his appearance.

9 Matthew Martens?

10 MR. MARTENS: Yes, Your Honor.

11 THE COURT: And Donna Walsh?

12 MS. WALSH: Yes, Your Honor.

13 THE COURT: I have read your submissions and the case
14 law that each of you have cited in support of your submissions
15 on this issue.

16 The initial and, perhaps, the most significant
17 problem I'm having in resolving your dispute is that after
18 reading the January 5th letter that was sent to me by you,
19 Mr. Paikin, I'm not certain I know what it is precisely that
20 you're seeking that you have been denied.

21 Now, the letter in response to your letter to me, the
22 letter of January 16th of Mr. Jabbour, it seems to give me --
23 well, it does give me the view of the CFPB as to what you are
24 seeking, but I'm obviously not prepared to accept that as your
25 statement.

1 So in light of that, you need to tell me just exactly
2 what documents, what policies, what guidance materials or what
3 preliminary or interim or draft documents you're seeking,
4 because it seems that reading Mr. Jabbour's letter, the
5 description of what I believe the Bureau is saying you're
6 asking for is precisely along those lines and you may disagree
7 with that. So if you do, I need to understand that.

8 So tell me what it is that you're seeking in your
9 Request for Production of Documents, as well as in your Answers
10 to Interrogatories.

11 MR. PAIKIN: Thank you, Your Honor. This is Jonathan
12 Paikin.

13 So in direct response to your question, I think there
14 are two areas where we have discovery disputes that we have
15 raised with the Court.

16 The first is that we're seeking documents and
17 communications, both internal and external, which I think
18 Mr. Jabbour's letter indicates that it's only internal to CFPB
19 documents, but there are external communications that the CFPB
20 had with the Department of Education, members of congress and
21 others about, and we have identified also for the CFPB, which
22 isn't in their letter, 20 specific instances where there was
23 policies or guidance that was put out by either the Department
24 of Education or the CFPB addressing the specific issues that
25 are involved in the litigation.

1 So that's the first dispute is that we have sought
2 those documents and communications, both internal and external,
3 with respect to policies and guidance in those 20 instances
4 that we have identified, which each of those relate to the
5 litigation.

6 The second area where we have a dispute is documents
7 and communications that the CFPB has had with third-party
8 servicers that are in the same space as we are, and many of
9 them also under contract with the Department of Education, that
10 relate to specific issues in this case.

11 In back and forth correspondence and meeting confers
12 that we have had with the CFPB, we have identified on the
13 servicers' side, there are six specific issues, and I think
14 there are about four servicers that are in play, and on the
15 collection side, I think the universe is a little bit broader,
16 the number of parties potentially involved, but there is two
17 issues.

18 So those are the two areas that are in dispute, and
19 if I may be permitted, Your Honor, to sort of step back and
20 give context and respond to some of the points that are in the
21 CFPB's letter to you on January 16th?

22 THE COURT: Sure. Go ahead.

23 MR. PAIKIN: So I think, Your Honor, what is
24 important to know about this case that distinguishes it from
25 many of the other cases that are set forth in the CFPB's letter

1 is that in this case, the defendants are vendors of the Federal
2 Government that have been hired by the Department of Education
3 to service and collect Federal student loans, and that regimen
4 is governed both by extensive and detailed regulations that are
5 constantly being debated and revised, but also by the
6 government contract.

7 If the government wants something done differently by
8 Navient or by Pioneer, there is a process in those contracts to
9 change that practice, and in most instances where there is
10 costs that are associated with that change in practice, there
11 is also a process that adjusts the compensation that's paid
12 under the contract.

13 The government also regularly audits the defendants,
14 and more than that, this isn't a circumstance where there is an
15 annual audit. This is a circumstance where they are really
16 hand in glove, where there is daily contact between my clients
17 and the Department of Education reviewing calls, e-mails, data
18 reporting and the like, and so the relationship is very close
19 here.

20 What we have is a situation where the CFPB and the
21 Department of Education are different arms of the Federal
22 Government.

23 Navient -- I think the best analogy here -- Navient
24 is really a marionette that is being held by the Department of
25 Education.

1 What this case really comes down to is the CFPB is
2 seeking fines against my client for what the right hand of the
3 government has told them to do, the Department of Education,
4 and the left hand, the CFPB, has a different view with respect
5 to some things as to what should be done.

6 Because of that, unlike a situation where there's a
7 party that's simply involved in an enforcement action trying to
8 seek information about the policies of, say, the FCC or some
9 enforcement agency, this is not that situation.

10 In this case, the Department of Education and the
11 CFPB have looked very closely and been interacting with one
12 another at various times, as well as members of congress, to
13 determine how the government should administer its vendors
14 through the regulation and guidance and through the contracts
15 that they administer.

16 We have identified, as I said earlier, 20 times when
17 the government has issued guidance or regulations that are
18 directly related to the practices at issue in this complaint.
19 We provided that list, as I said, to the CFPB on October 24th.

20 We served, by the way, a subpoena on the Department
21 of Education seeking these same documents, and the Department
22 of Education did not object to that subpoena on relevance or
23 proportionality grounds.

24 From our perspective, the CFPB put the reasonableness
25 of defendant's conduct into issue. That's the core of what a

1 UDAP claim is, that we're acting in an unfair or abusive way.

2 The conversations that took place, both internally at
3 the CFPB and the conversations that the CFPB had externally
4 with the Department of Education, with members of congress and
5 other interest groups with respect to what is the appropriate
6 guidance issues, are clearly relevant, particularly under the
7 relevant standard applicable in discovery, are clearly relevant
8 and highly probative to affirmative defenses that we have pled
9 and, frankly, a key narrative that we intend to present at
10 trial in this action.

11 THE COURT: Apparently, these are not documents that
12 have been officially published such that they are in the public
13 domain via one or another official government publication, is
14 that correct?

15 MR. PAIKIN: Correct, Your Honor.

16 We do have -- and that is how we were able to
17 identify the 20 instances where there was policy or guidance
18 that was issued because we had seen that in the Federal
19 Register or in other publications that have been put out.

20 But what we're seeking is the communications that
21 surround those publications.

22 THE COURT: But as to the publications themselves, am
23 I understanding -- and correct me if I'm wrong -- am I
24 understanding that the publications themselves were locatable
25 by you in the Federal Register or in the Code of Federal

1 Regulations?

2 MR. PAIKIN: Yes, Your Honor, or otherwise publically
3 available.

4 THE COURT: I understand. You can continue.

5 MR. PAIKIN: So some of those things, just to put a
6 little bit of meat on the bones and give some examples, there
7 has been guidance that has been put out about repayment plans,
8 and one of the big issues, as Your Honor may recall from the
9 motion to dismiss arguments, is the steering allegations about
10 whether or not forbearance or IDR plans are better from the
11 standpoint of the borrower.

12 There has been guidance that's been put out about
13 that, and there were discussions among various government
14 parties to determine when in different circumstances one is
15 better than the other, and the CFPB's position here is
16 forbearance is bad and IDR is good.

17 You know, we would show and we will show that that is
18 not always the case, that there is a lot of gray and a lot of
19 different reasons for that, and the Department of Education has
20 a much more nuanced approach. So those types of communications
21 surrounding that guidance that was issued are highly relevant.

22 Another example is the CFPB takes issue with the
23 disclosures that were made on IDR recertification notices.
24 There are rules that have been out about what disclosures need
25 to happen and look like in the IDR recertification context.

1 So the CFPB's position here that the recertification
2 notices that were sent out were unfair in some way, the
3 discussions that took place between the Department of
4 Education, the CFPB, that's all highly relevant to the question
5 of the reasonableness of the defendant's actions.

6 Another one, the last one is that the CFPB has
7 regulations on balancing privacy interest.

8 As Your Honor may recall, Count 3 alleges that by
9 sending an e-mail that contained a link to the renewal
10 documents that that was an unfair practice.

11 THE COURT: Yes, I recall that.

12 MR. PAIKIN: So there are regulations that surround
13 that about how do you balance privacy interest and what would
14 be appropriate to send to borrowers.

15 All of that has been placed, in our view, directly at
16 issue, and knowing what the CFPB, the Department of Education,
17 and others, how they were weighing that, is all information
18 that we should be entitled to see.

19 You know, maybe I'll stop there. That sort of brings
20 us to the end of the first discovery dispute. I can go on to
21 the second one which deals with the third-party issues, or if
22 Your Honor would prefer, maybe I should stop here?

23 THE COURT: I think, Mr. Paikin, that is a
24 substantial amount of information you have given me with
25 respect to this first issue, and it might be useful for me to

1 hear from Mr. Jabbour in response before we move on to anything
2 else.

3 Mr. Jabbour.

4 MR. JABBOUR: Thank you, Your Honor.

5 To the extent that there are any Bureau policies or
6 Department of Education policies or guidance that have any
7 bearing on the claims in this case, really, the only applicable
8 inquiry is to look at what that policy or guidance document
9 says on its face, as well as what any public interpretations
10 there has been regarding that policy or guidance, and how
11 Navient applied that policy or guidance to its own conduct such
12 that it believes it didn't violate the law.

13 But, really, the predecisional views of Bureau
14 employees or Department of Education employees that are
15 contained in intra-agency documents are not expressions of
16 agency policy, and they don't carry any weight when trying to
17 apply a policy or guidance document to the facts of this case.

18 So, simply put, agency employees don't speak for the
19 Bureau, and there is always frank and honest communication
20 among agency employees to reach any sort of policy or guidance
21 document, and those intra-agency communications would be
22 chilled if we started to attach legal significance to them.

23 So, really, the bottom line here is that to the
24 extent that Navient is putting forth any defense based on
25 Bureau policies or guidance, the only relevant exercise is to

1 look at the language of those policy or guidance documents and
2 any official public interpretations of them and to see whether
3 or not Navient's defense carries any weight.

4 But Navient could not have been aware of any
5 intra-Bureau communications, and so it could not have fashioned
6 its conduct based on those intra-Bureau communications. So
7 they're simply not relevant to any claim or defense in the
8 case.

9 I will note that the view I have articulated here is
10 not novel in any way. Numerous courts, as we cited in our
11 letter to the Court, have held that unpublished views of agency
12 staff is not official agency position and don't carry any legal
13 significance.

14 In addition to those we cite in our letter to the
15 Court, there are many more. This is a very commonly held view
16 by Courts.

17 So that is our basic position here regarding the
18 relevance issue.

19 I also note as a side issue that even if these
20 documents were determined to have some sort of marginal
21 relevance, we do think that they would be protected by the
22 deliberative process privilege in any event, but we think the
23 much easier route here to take is that they're simply not
24 relevant in the first place so we don't need to reach the
25 privilege question.

1 THE COURT: The sense of your argument as I'm
2 receiving it is that what you term the intra-agency employee
3 discussions were either preliminary to or collateral to the
4 ultimate determination of the official policy of the CFPB such
5 that much like the pre-contract formation discussions of the
6 parties in a contract action, they are not relevant because the
7 contract itself, when its an integrated document and complete
8 on its face, represents the meaning of the document as intended
9 by the parties, and you don't look behind that.

10 Is that analogous argument I'm raising what you're
11 telling me?

12 MR. JABBOUR: Yes, Your Honor. I think that is an
13 analogous argument.

14 I think that there's the additional points that
15 government formulations of policy and guidance rely on the
16 ability of employees to carry out these sorts of open
17 communications, and so we don't want to chill that exercise.

18 So there is that additional policy factor that I
19 think weighs in favor of not allowing the discoverability of
20 these documents.

21 THE COURT: Mr. Paikin also mentioned external
22 communications. Do you want to address that?

23 MR. JABBOUR: Sure.

24 Our view of that is to the extent there are external
25 communications that went into the formulation of these policies

1 or guidance, then those may be protected as well, but it really
2 just depends on whether or not -- I don't think there are many
3 in that category where we externally consulted with parties in
4 order to formulate a policy or guidance.

5 I think the one exception to what I just said is the
6 Department of Education, and we would view those as falling
7 into the same category where we don't think it's discoverable.

8 So to the extent there is an external party that
9 communicated with us in order to help us reach a policy or
10 guidance decision, then we would view that as falling into this
11 category.

12 THE COURT: So, Mr. Paikin, is the argument raised
13 here by Mr. Jabbour that you are essentially looking for
14 information that is in the nature of pre-policy determination
15 discussions among employees of the agency, and since they are
16 as such pre-policy determinations undertaken in the process of
17 reaching an ultimate policy that they're of no relevance to
18 you?

19 Is that what you're seeking, discussions of
20 pre-policy determination internally by agency employees?

21 MR. PAIKIN: So, yes, Your Honor, and let me tell you
22 why I think they're relevant and I think they're actually two
23 issues that have been blurred together.

24 One is a question of relevance and the second is
25 whether or not a deliberative process privilege would apply,

1 and I think some of the policy arguments that Mr. Jabbour
2 raised need to be looked at.

3 You know, these issues about chilling internal
4 deliberations really need to be looked at, not through a
5 relevance thing, because to be sure they're relevant, and I
6 will come back to that, but within the context of whether or
7 not a deliberative process privilege applies, and that is not
8 an absolute privilege.

9 There is Third Circuit law, and we have not briefed
10 it -- well, we didn't brief anything, but we didn't put it in
11 our letter, because when we had meeting confers, we had
12 understood that the CFPB was standing only on the relevance
13 ground and not on deliberative process.

14 With respect to the deliberative process, there is a
15 wealth of law that looks at that very issue, and that is not an
16 absolute privilege. It's a qualified privilege. It needs to
17 be viewed narrowly, and there is case law that makes very clear
18 that it needs to be reviewed narrowly.

19 The case law -- and there's a Third Circuit case
20 Redland Soccer Club versus Department of Army, which is 55 F.3d
21 827. It's a 1995 case. It says the defendant can overcome the
22 government's privilege claim by showing a sufficient need for
23 the material and the context of the facts or the nature of the
24 case.

25 You know, that same case says that the deliberate

1 process privilege, like other executive privileges, should be
2 narrowly construed.

3 At this point, we don't have the specific documents,
4 because what should happen is the government should produce a
5 log to the extent there are particular documents that it
6 believes are implicated.

7 By the way, those documents, you would have to redact
8 out the part that they think relate to internal deliberations
9 that would be privileged and would leave open a wide swath of
10 information that would be -- that would be responsive and not
11 privileged, and we would end up fighting over the question of
12 whether or not the specific documents that we narrow it down to
13 are impacted by the deliberative process privilege.

14 THE COURT: It would seem to me also that if this
15 issue of the deliberative privilege becomes dispositive here,
16 if we get beyond relevance, I don't know how I could rule on
17 such claims without engaging in an in camera inspection. You
18 tell me how I could do it.

19 OMR. PAIKIN: I'm not sure, given that at this point,
20 Your Honor, we don't know what documents we're talking about.

21 I mean, we're having the same conversations with the
22 Department of Education, who is not standing on relevance
23 grounds and they are producing materials, and to be sure there
24 are some documents that may well be covered by the deliberative
25 process privilege, but we're having discussions with them and

1 trying to narrow that through the met and confer process. I
2 expect we will work that out with the Department of Education.

3 I would envision if the CFPB would take a similar
4 approach here, we would have similar conversations with them.
5 The problem is that they are taking a carte blanche at the gate
6 position that none of this material is relevant, and I think
7 just by looking at the cases that discuss the deliberative
8 process privilege and the reason why it exists and the unique
9 facts of this case where, in fact, we are a government
10 contractor and so, you know, if this was a breach of contract
11 type of case, to draw on the analogy, the communications that
12 the contractor was having about what would be appropriate
13 performance by the subcontractor takes a position that that
14 somehow is not relevant in a breach of contract case, I don't
15 think it would pass muster.

16 What is unique here, though, is this deliberative
17 process privilege, which, again, is a qualified privilege to be
18 narrowly construed.

19 We're open to having discussions with the CFPB about
20 how that applies, but without knowing the documents -- and the
21 Rules of Civil Procedure envision that that's why you have a
22 privilege law, you know, with an identification of the
23 documents and the subject matter.

24 So we can have a discussion with them in the first
25 instance, and to the extent we have a dispute, bring it to the

1 Court. It may well require in camera review of some documents,
2 if we get there, but we're at the threshold stage, and that's
3 where the holdup has come and that's why we are before the
4 Court to rule on the relevance issue today, and if there is a
5 deliberative process issue, then that would come down the line.

6 THE COURT: Mr. Jabbour, are you there?

7 MR. JABBOUR: Yes.

8 THE COURT: Address this question of the deliberative
9 process privilege with particular reference to whether this is
10 something that is even remotely in a posture where I can decide
11 that issue.

12 MR. JABBOUR: Your Honor, we think that this issue
13 can be decided purely on the relevance issue and that the
14 deliberative process issue need not be reached by the Court,
15 and it's probably not in the correct posture for the Court to
16 reach it at this point.

17 Again, the Court need not reach that issue if it
18 decides that the documents are not relevant in the first place,
19 and I do want to take the opportunity, Your Honor, to address
20 some of the points that Mr. Paikin made, if that is okay?

21 THE COURT: Sure. Go ahead.

22 MR. JABBOUR: Mr. Paikin has brought up on a couple
23 of occasions that Ed. has not made any relevance objections to
24 producing the documents that have been sought.

25 I will note that Ed. is not the party that's

1 asserting the claims here and Ed. is not charged with enforcing
2 the laws that we have brought the claims under. So Ed. is not
3 in a position to know what is or is not relevant to the
4 Bureau's claim.

5 So the fact that they're producing documents and
6 haven't asserted relevance objections shouldn't come as a
7 surprise.

8 With respect to this argument that Mr. Paikin has
9 continually made about how Navient is a government contractor,
10 I guess I fail to understand exactly what the significance of
11 that fact is.

12 If the significance of that fact is that there's a
13 contract at play here, Navient asserts that on the face of the
14 contract there is some provision that absolves us from
15 liability or that Ed. told, gave it explicit guidance that said
16 that it was all right to do the conduct that we have alleged is
17 illegal, then certainly Navient should come forward with that
18 evidence and show it to the Court, but the fact that there are
19 underlying intra-agency communications that preceded some of
20 these policy or guidance documents from the Bureau, doesn't
21 really -- there is no connection between those intra-agency
22 communications and the fact that Navient is a government
23 contractor.

24 If Navient wants to assert various defenses based on
25 documents that it already has in its possession, it's free to

1 do that.

2 THE COURT: Let me ask you, if I may, Mr. Jabbour,
3 and pardon me for interrupting you, but let me ask you, if Mr.
4 Paikin were to argue that there are internal agency documents
5 or memorializations of discussions within the agency whose
6 content is at variance with the positions or allegations of the
7 complaint that's been filed against Navient, why aren't they
8 entitled to that?

9 MR. JABBOUR: Well, they're not entitled to that,
10 because those sorts of positions actually are common and they
11 are not unexpected.

12 In any government deliberation, there are going to be
13 weighing of both sides of an argument or reach the final policy
14 formulation, and so, really, the only thing that matters is
15 what that final policy formulation is, but the government
16 shouldn't have to think about, well, if we are weighing the
17 pros and cons of a particular policy decision, do we have to
18 worry that some party is later on going to try to interpret
19 that to mean that we held a particular view and rejected it at
20 one point.

21 THE COURT: I'm not so much worried about the
22 circumstance where there is a weighing of the pros and cons,
23 because I understand your argument completely on that, that the
24 agency ought to be free in formulating its ultimate policy, to
25 consider contrary views or to identify deficiencies in the

1 agency's rationale with respect to any position it takes, and
2 that you ought to be able to do that in connection with the
3 formulation of a policy.

4 Rather, I'm talking more about the circumstance where
5 there are simply internal policies formulated and concluded
6 that are at variance with the positions taken by the CFPB in
7 this case.

8 Certainly, as to those, wouldn't they be
9 discoverable, to the extent they exist?

10 MR. JABBOUR: No, Your Honor.

11 To the extent that there is any final policy decision
12 that was reached, that would have been published and
13 communicated more broadly. So everything preceding --

14 THE COURT: So there is nothing else?

15 What you're telling me in terms of finalized
16 conclusive policies of the Bureau, those are all matters in the
17 public domain which have been duly published either in the
18 Federal Register or in another appropriate governmental
19 publication?

20 MR. JABBOUR: That's correct.

21 We provided a large volume of those to the defendants
22 back in August.

23 So, yes, those are all out there, and everything
24 before is in the nature of predecisional documents.

25 THE COURT: All right. I understand your position.

1 MR. PAIKIN: Your Honor, may I speak?

2 THE COURT: Go right ahead.

3 MR. PAIKIN: What's different about this case, Your
4 Honor, is that what's directly at issue is the reasonableness
5 of the conduct.

6 That policy debate about pros and cons, the
7 Department of Education came out in a particular way, not just
8 in regulations, but through the contract directives or the
9 omissions or knowing after the audit that something was
10 happening a certain way and not directing that it be done
11 differently, and the weighing of the pros and cons and the
12 policy debates, to be sure there's going to be differences and
13 there's going to be debate, and there has been and Navient
14 takes direction.

15 What's different here is that the CFPB is saying that
16 the conduct of Navient was so unfair, so egregious, that they
17 should be penalized to the tune of millions of dollars.

18 And the very fact that there is that debate, that
19 internal policy debate and the external policy debate about the
20 range of reasonableness, in itself shows that Navient, acting
21 under the direction, an audit of the Department of Education
22 and its policy judgment, shouldn't be held liable for
23 multi-millions of dollars because the CFPB lost a policy debate
24 and now wants to use its UDAP authority to try to impose
25 retroactive penalties in those levels. They have put that

1 debate clearly into relevance.

2 Whether there is a deliberative process privilege
3 that might protect some of it, that's for another day. The
4 issue now is, is that relevant? It clearly is.

5 THE COURT: If you can, tell me as specifically as
6 you can what documents you're looking for, because I'm still
7 struggling with your request, because it seems -- and, please,
8 I mean no disrespect by this -- it seems that you are not quite
9 sure what you're looking for.

10 MR. PAIKIN: So I think what we're looking for are
11 with respect to -- and there is a list of 20 guidance that was
12 put out that we provided to CFPB -- there are 20 specific
13 instances where the government had made determinations about
14 particular policies and issued guidance or regulation, and we
15 do have those, the end product.

16 What we're looking for is both the internal at the
17 CFPB and the communications that the CFPB had with the
18 Department of Education discussing those policies.

19 So coming back to a specific example, one of the 20,
20 with respect to the Count 3 issue for sending a notice and
21 whether or not sending a notice with a link would be
22 appropriate or not.

23 There were, we believe, that there were discussions
24 between members of the CFPB and with the Department of
25 Education discussing how do you weigh those various issues, and

1 no doubt some people and some guidance that's put out favors
2 the privacy interest and took the position that it's dangerous
3 to send personally identifying information to borrowers by
4 e-mail, and that the appropriate way to do it is to send an
5 e-mail saying, click on this link, and then that's at a secure
6 location, and the borrower's information is protected in that
7 manner.

8 Others said, no. Instead, what we should do is, we
9 want to err on the side of providing more notice and sending
10 the document or saying a different header or, in fact, what was
11 done when the policy was changed at the direction of the
12 Department of Education to do what is being done now.

13 So the documents that relate to that discussion is
14 the evidence that we would put in front of the jury to say --
15 for the CFPB to now come in and say that my client's decision
16 to send an e-mail with a link in it is so unfair that they need
17 to be penalized millions of dollars is itself unfair and is
18 wrong and my client should not be found liable.

19 THE COURT: Because somewhere in the process that led
20 to the final policy, one or more persons voiced the view that
21 what Navient is being accused of was, in fact, not
22 inappropriate.

23 Is that what you're telling me?

24 MR. PAIKIN: Correct. Because the standard that the
25 jury needs to determine at the end of the day really boils

1 down -- the question of unfairness boils down to the
2 reasonableness of that conduct, and the fact that there is
3 legitimate policy debates about the range of reasonableness
4 demonstrates that the conduct here was not so unreasonable as
5 to justify massive fines.

6 THE COURT: I would like you to at some point as soon
7 as possible, after we conclude this conference, I would like
8 you to identify of record the 20 policies that you have made
9 reference to so that I may understand what specific policies
10 you are speaking of.

11 MR. PAIKIN: We will do that, Your Honor.

12 It's contained in the October 24th letter that we
13 sent to the CFPB, and we will submit that and maybe a little
14 explanation of each to the Court.

15 THE COURT: I would appreciate that.

16 Unless either one of you have anything else to say on
17 that issue, I think I understand what divides you. This is not
18 an issue I'm going to resolve over the telephone here today,
19 but I do understand where each side stands.

20 With that, Mr. Paikin, you can move to that second
21 issue, which, I believe, was the question of communications
22 with third-party service providers.

23 MR. PAIKIN: Thank you, Your Honor.

24 So with respect to this second issue, we have a
25 disagreement over whether or not the CFPB should produce the

1 documents and communications that it's had with other servicers
2 and collection companies.

3 Through the course of the meeting confers that we've
4 had with the CFPB, we narrowed that down to 8 specific issues,
5 and that's also in the October 24th letter that we provided to
6 the CFPB, which are communications with borrowers about
7 repayment plans and policies, rates of enrollment and
8 forbearance and income driven repayment, some call center
9 operations, compensation plans and metrics and things of the
10 like.

11 I'm happy to provide the Court, when we submit the
12 other information, the list, but we have taken efforts to
13 narrow it to the issues that are specifically related to the
14 allegations in the complaint.

15 We have also had discussions both with the CFPB and
16 with the Department of Education in their producing this
17 information to us that they have in their possession.

18 There are really probably four servicers that are
19 particularly at issue. Three of them are also under contract
20 with the Department of Education. It's Great Lakes, PHEAA and
21 Nelnet, and there is one other major servicer out there, ACF.

22 It is not some mass. We're talking about four
23 specific servicers with a collection universe. There may be 20
24 or so people out there, but the issues are far narrower.

25 So we focused in and explained to the CFPB what the

1 issues and who the third parties are that are at issue.

2 The CFPB in their letter to Your Honor say that the
3 reason why we're going after this is because we want to
4 basically make a why me defense, a selective enforcement
5 defense, and that's not relevant.

6 That's not, as the CFPB should well know, because we
7 have discussed it with them many times.

8 The reason why this information is relevant is not
9 because of a selective enforcement defense, but, again, because
10 it goes to the reasonableness of defendant's conduct and
11 industry practice.

12 Again, Navient and these other providers; Great
13 Lakes, PHEAA, Nelnet, they're under daily oversight by the
14 Department of Education, and what those other industry players
15 understood the rules to be with respect to the allegations are
16 directly relevant to this case.

17 In fact, in a case that the CFPB didn't cite, the
18 CFPB has made the opposite argument and said that where
19 Defendants are not complying with industry practice, that is
20 evidence of unfairness.

21 There is a North Dakota case, the CFPB versus
22 Intercept Corporation, which is 2017 Westlaw 3774379. It's a
23 district in the northern North Dakota, March 17th, 2017, where
24 that was the CFPB's argument, that the failure to comply with
25 industry practices regarding payment processing demonstrated

1 unfair conduct under UDAP.

2 So the fact that Navient was acting consistent with
3 what all the other players in the industry understood the rules
4 to be from the Department of Education is very relevant.

5 The other reason why this information is relevant is
6 because, in large measure, the CFPB has put it directly into
7 issue.

8 Again, just taking one example to this going back to
9 Count 3, one of the issues -- and when Your Honor denied our
10 motion to dismiss, one of the allegations that was pointed to
11 was the fact that after the recertification notice change, so
12 after the e-mail then changed the language that was sent out,
13 the response rate for those people that were recertifying
14 change, it went up dramatically and that that was an indication
15 that perhaps it was unfair.

16 What we couldn't argue on a motion to dismiss,
17 because we're bound to the allegation, is that, in fact, in
18 that same time period, the Department of Education did a
19 targeted communications blitz to borrowers, all the borrowers
20 that had Federal loans, advising them of the recertification
21 process.

22 In fact, the Department of Education told the
23 servicers during that period not to send any notices to the
24 borrowers.

25 So the fact that there was in the after period, after

1 the e-mail change, the fact that there was an uptick in
2 recertification rates probably reflects more of the fact of the
3 targeted communications effort by the Department of Education
4 than the language or the practice of sending a link in an
5 e-mail.

6 That's extremely relevant, and the CFPB has made that
7 allegation, and Your Honor, in fact, pointed to that allegation
8 in denying our motion to dismiss.

9 It's very relevant to know whether or not the
10 experience of other loan servicers, given the notices that they
11 were sending out, whether they had a similar experience,
12 whether they also saw that this targeted communications effort
13 changed the recertification rates, or whether it was because of
14 their language. We've got test cases from at least three other
15 servicers that would answer that question.

16 Similarly, the CFPB puts into issue the amount of
17 people that are serviced by Navient that went into forbearance
18 versus the amount of people that went into the IDR plans that
19 they think are better. They imply that somehow Navient was
20 acting improperly in what it was doing.

21 It becomes very relevant whether or not is that what
22 the Department of Education wanted? Did the Department of
23 Education think that that was problematic? Did they have an
24 issue with it? What were the rates with respect to the other
25 servicers of their borrowers that they were servicing? How

1 many of them were going into forbearance and how many of them
2 were going into IDR plans?

3 THE COURT: Mr. Paikin, let me just interrupt you and
4 ask you, as I listen carefully to what you tell me, it seems
5 that your focus has been on the Department of Education
6 communications more so than -- much more so than communications
7 from the CFPB to the other third-party service providers like
8 PHEAA and Great Lakes, et cetera.

9 Unless I'm misunderstanding you, why is it that those
10 communications are not obtainable by you through the Department
11 of Education?

12 MR. PAIKIN: So we are going to obtain what the
13 Department of Education has, but in addition to that,
14 separately, the CFPB has supervisory role over the servicers
15 here, and so the CFPB was having conversations and
16 communications with the servicers that the Department of
17 Education wouldn't have been involved with.

18 We have limited the communications that we're seeking
19 to the ones on that list which are specific to the issues in
20 the lawsuit.

21 So those are the documents we're seeking, the
22 communications that the CFPB had with those servicers and
23 collection companies that relate to the issues in the lawsuit,
24 and we don't believe that those are communications that the
25 Department of Education would have.

1 THE COURT: So, Mr. Jabbour, let me ask you to
2 respond to that.

3 The thrust of the argument made by Mr. Paikin is that
4 it ought to know -- Navient ought to know what, not only the
5 Department of Education, but also the Consumer Financial
6 Protection Bureau has told other service providers with respect
7 to the manner in which they're to conduct their service
8 providing so as to allow Navient to make the argument if the
9 facts support it that they did nothing different than what
10 other third-party service providers did, and that what those
11 providers did was not found by the Bureau to be inappropriate
12 or otherwise in violation of the act. That is his argument.

13 Why isn't he entitled to know what the Bureau has
14 done with other providers?

15 MR. JABBOUR: Well, there are two main reasons.

16 First of all, even assuming for the sake of
17 argument -- and really this is a hypothetical so I'm not trying
18 to message anything here -- even assuming that there was some
19 instance where the Bureau examined some other entity and it
20 turned out that that other entity was violating the law and was
21 treated differently, that fact actually wouldn't be relevant,
22 and the case law supports that view over and over again.

23 It is really in the Bureau's discretion and any other
24 government regulator's discretion to determine how to allocate
25 resources, how best to enforce the law, and so there can be

1 instances where other competitors violated the law and they are
2 not prosecuted, and the Courts have consistently held that that
3 fact is irrelevant.

4 But the second point I also want to make here is that
5 Mr. Paikin constantly throws around the big word of
6 reasonableness and says that that's what this case is all
7 about, but I think we really need to focus here on the specific
8 elements of the claims that the Bureau has brought and
9 understanding specifically where this reasonableness standard
10 that Mr. Paikin has tried to invoke comes into play.

11 In our view, every single element of every claim that
12 the Bureau has brought looks at the relationship between
13 Navient and the consumer. It doesn't look at what other
14 industry players are doing. The only thing that matters is
15 what is the relationship between Navient and the consumer and
16 how is Navient interacting with the consumer.

17 It is not an instance where a comparison between
18 Navient and its peers is relevant, because what we don't want
19 in the consumer finance world is basically a race to the bottom
20 where every player in the industry can injure consumers in the
21 same way and then claim -- and then tell a fact finder, look,
22 our behavior was no worse than anybody else's and so we
23 shouldn't be prosecuted because everyone else was doing this.

24 THE COURT: Well, sure.

25 Suppose -- in connection with this request that

1 Navient has made -- suppose the documents disclose specific
2 occasions when the Bureau approved of conduct for another
3 provider, conduct that is now being asserted as unlawful in
4 connection with Navient.

5 This is not -- in other words, this is not a
6 situation where the inquiry is to see whether other persons
7 have gotten away with anything, other providers have gotten
8 away with anything, but rather the circumstance where the
9 Bureau has actually approved or condoned conduct that it now
10 charges Navient with having engaged in as unlawful.

11 If such documents existed, aren't they discoverable?

12 MR. JABBOUR: Your Honor, no, they wouldn't be.

13 THE COURT: Why not?

14 If the Bureau approved of a certain course of conduct
15 by another provider that you're now seeing fit to indicate is
16 unlawful with respect to Navient, why aren't they entitled to
17 know that?

18 MR. JABBOUR: First off, I note that the Bureau
19 doesn't approve of --

20 THE COURT: That may be, but that's our frame of
21 reference for purposes of this discussion anyway.

22 Go ahead.

23 MR. JABBOUR: Sure. Every service provider presents
24 with different facts and different circumstances.

25 So an exact one-to-one comparison between Navient and

1 another service provider is actually really difficult to do.
2 There can be comparisons, I suppose, but I think this actually
3 borders on getting into a little bit of an unmanageable
4 exercise.

5 For instance, Mr. Paikin zeroed in on the percent of
6 borrowers who are in forbearance as some sort of relevant data
7 point, but really the fact that there is a certain percentage
8 of borrowers in forbearance for Navient versus some other
9 servicer doesn't actually answer the question as to whether or
10 not Navient was steering borrowers into forbearance.

11 Navient could have some low percentage for some
12 reason, but the fact for borrowers who are having trouble
13 making payments, Navient still isn't giving them the right
14 advice.

15 So that's why I think it's important for Mr. Paikin
16 to actually articulate in more detail, which I think he is
17 unable to do, what element of each claim he believes demands
18 some sort of comparison to competitors and exactly what
19 evidence would be used to support that inquiry, because I think
20 once we engage in that inquiry, there really is no place where
21 a comparison with competitors is appropriate.

22 THE COURT: Well, I will agree with you that I have
23 difficulty at this point identifying specifically what is being
24 sought by Navient, although I appreciate Mr. Paikin's efforts
25 to give me that information.

1 That's why in connection with the previous issue, I
2 asked for the 20 policy publications as to which requests are
3 being made for the discussions leading to those policies. At
4 least that gives me a frame of reference, gentlemen, to
5 evaluate what it is you want.

6 I'm having a lot of difficulty -- of course, I don't
7 have the interrogatories, nor do I have the Request for
8 Production of Documents, so I'm at a significant disadvantage
9 in knowing what has been asked for.

10 But in all candor, I don't have enough information to
11 make a ruling on this matter based on what I've heard.

12 I understand your arguments and you have made them
13 clearly, but when I try to apply them to specific requests or
14 specific documents or specific categories of documents, I'm
15 coming up short here, and you're going to have to come back to
16 me and refine what your issues are; otherwise, this is going to
17 be a very, very difficult decision for me to make and one that
18 may leave more questions than answers and I don't want that.

19 So my suggestion here is -- and I'm willing to
20 discuss this with you again if you are so inclined -- but my
21 suggestion is that you need to try to give me a joint statement
22 of what precisely separates you.

23 Again, I know the arguments as to why you're
24 separated, but I don't think I understand fully what it is
25 substantively that you're at loggerheads over; what documents,

1 what kinds of documents, and in connection with what claims;
2 otherwise, deciding relevancy becomes a very, very amorphous
3 pursuit for me, and I think that's not what is going to serve
4 anybody's interest here, certainly not yours.

5 That's my suggestion to you, in addition to
6 Mr. Paikin sending me the letter to which he made reference
7 where 20 policies are set forth.

8 Can you do that?

9 MR. PAIKIN: Your Honor, this is Jonathan Paikin. I
10 believe we can and we will endeavor to do so.

11 THE COURT: How much time do you need to do that?

12 MR. PAIKIN: Well, given that it's a joint -- you
13 requested a joint effort, we probably need to work with CFPB to
14 try to reach agreement as to what that list is.

15 I ask Mr. Jabbour, you know, if we could get him
16 something by a week from today over to CFPB, that would give
17 them an opportunity then to look at it, and I'm not sure how
18 long they would need, but, perhaps, you know, two weeks from
19 today we endeavor to submit something to the Court.

20 THE COURT: I will give you whatever time the two of
21 you think you need. The issue is that important to the
22 development of the case, I'm well aware of that, and I don't
23 want to rush you on this, but, obviously, we are all interested
24 in moving the case along.

25 Mr. Jabbour, what do you think?

1 MR. JABBOUR: Your Honor, I think a total -- just
2 going off of what Mr. Paikin said -- first of all, we're fine
3 with the joint statement.

4 I think if they would like a week to kind of
5 articulate their position, we can place our position in the
6 same document in another week, and there may be some back and
7 forth after that, so perhaps three weeks is kind of a
8 reasonable estimate of the total time this would take.

9 THE COURT: All right. That is certainly fine with
10 me.

11 If you wish, I will issue a formal order beyond what
12 I have said in this conversation.

13 If you are satisfied that you understand what I'm
14 looking for, I will defer issuing any order, but I will let
15 that up to you.

16 I will give you three weeks to send me that joint
17 statement of what precisely is at dispute here.

18 MR. PAIKIN: Your Honor, in a separate filing, you
19 had asked that we identify the specific guidance. Would you
20 like that sooner, or should we do that on the same schedule?

21 THE COURT: If you can get it to me sooner, that's
22 fine, but, obviously, that document, together with the joint
23 statement, will put me in a far better position to rule on this
24 than I am right now.

25 So if it's fitting for the two of you, you can submit

1 that along with the joint statement.

2 MR. PAIKIN: Very good, Your Honor. We will do that.

3 THE COURT: All right.

4 MR. JABBOUR: That's fine with the Bureau as well,
5 Your Honor, and we don't need an order.

6 THE COURT: You do not need an order, is that
7 correct?

8 MR. JABBOUR: From the Bureau's standpoint, we do
9 not.

10 MR. PAIKIN: Your Honor, everything you say I think
11 is in order.

12 THE COURT: Fair enough.

13 MR. PAIKIN: It will be unnecessary.

14 THE COURT: Thank you, gentlemen. I will look
15 forward to your statement and the other document as well.

16 Thank you very much.

17 (At this time, the proceedings in the above-captioned
18 matter concluded.)

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C E R T I F I C A T E

I, SUZANNE A. HALKO, Official Court Reporter for the United States District Court for the Middle District of Pennsylvania, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of the within-mentioned proceedings had in the above-mentioned and numbered cause on the date or dates hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my supervision.

SUZANNE A. HALKO, RMR,CRR
Official Court Reporter

REPORTED BY:

SUZANNE A. HALKO, RMR,CRR
Official Court Reporter
United States District Court
Middle District of Pennsylvania
Scranton, Pennsylvania 18501

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